IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY TENUTO	:	**CIVIL ACTION**
	:	
v.	:	
	:	
TRANSWORLD SYSTEMS, INC.	:	**NO. 99-4228**

M E M O R A N D U M

WALDMAN, J. **September 29, 2000**

Plaintiff has asserted claims under § 1692e of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq. ("FDCPA"), and the Pennsylvania Unfair Trade Practices & Consumer Protection Law and Regulations, 73 P.S. §§ 201-1 et seq.; 37 Pa. Code § 303.3 (11) ("UTP/CPL"). Presently before the court is plaintiff's Motion for Class Certification which has been held in abeyance pending resolution of defendant's motion for summary judgment and the conclusion of the parties' settlement discussions on September 20, 2000.

Plaintiff seeks to certify two classes. The first is defined as "all persons with addresses in the Commonwealth of Pennsylvania to whom letters were sent by Transworld Systems, Inc., containing a statement that post-judgment remedies may include wage or bank account garnishment, in an attempt to collect a debt incurred primarily for personal, family or household purposes which letters were not returned as undelivered

by the Post Office during the one year period prior to the filing of the complaint in this action." The second class is defined in the same language except that the relevant time period is "the four year period prior to the filing of the complaint in this action."[1]

Plaintiff alleges that during the class periods defendant sent a form letter to Pennsylvania residents in an attempt to collect alleged debts incurred for personal, family, or household purposes. The letter stated that "[p]ost-judgment remedies themselves can be costly in a variety of ways, which may include wage or bank account garnishment or execution on other assets." Pennsylvania law forbids wage garnishment to collect on debts incurred for personal, family or household purposes, subject to certain exceptions. See 42 Pa. C.S.A. § 8127. Plaintiff claims that the form letter was thus false, deceptive and misleading in violation of the FDCPA and UTP/CPL.

Defendant is a collection agency with over 40,000 clients nationwide. It handles both consumer and commercial debt collection for its clients in the same manner. Defendant sends

[1]It appears that the purpose of defining a second class is to permit recovery under the UTP/CPL by recipients of the challenged letter who are barred from recovery under the FDCPA by the one year limitation period. The court thus assumes that plaintiff meant to define this class as persons who received the letter more than one year, but no more than four years, prior to the filing of the complaint. Otherwise, there would be a needless overlap in the classes.

out a series of five letters to debtors at fourteen day intervals seeking payment. If the debt is not paid within that period, it will contact debtors by phone and assist its client in further collection efforts including litigation. Defendant does not keep records of the nature of a particular debt. It only receives the name and address of the debtor, the amount due and the date of the last payment.

The form letter sent to all debtors contained a sentence suggesting that the recipient's wages could be garnished if the debt remained unpaid and the creditor elected to "proceed judicially." Under Pennsylvania law, wages may only be garnished in connection with an action or proceedings: (1) involving divorce; (2) for support; (3) for board for four weeks or less; (4) for crime restitution; (5) for damages awarded to a judgment creditor-landlord arising out of a residential lease upon which a court has rendered a final judgment; or, (6) under the Pennsylvania Higher Education Assistance Agency Act. See 42 Pa. C.S.A. § 8127.

Certification of class actions is governed by Fed. R. Civ. P. 23(a) which requires that the following factors be satisfied:

> (1)the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the

class; and,
(4) the representative parties will fairly and adequately protect the interests of the class.

A plaintiff must also satisfy one of the requirements of subsection (b) of Rule 23. Plaintiff has moved for certification under Rule 23(b)(3) which requires the court to find that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy," or alternatively under Rule 23(b)(2) because "defendant has acted or refused to act on grounds generally applicable to the class, making appropriate declaratory relief with respect to the class as a whole."

Defendant contends that plaintiff cannot satisfy the numerosity, typicality, or adequacy requirements of Rule 23(a) and the criteria of Rule 23(b)(2) or Rule 23(b)(3). The burden is on the plaintiff to demonstrate that a class should be certified. Davis v. Romney, 490 F.2d 1360, 1366 (3d Cir. 1974). When deciding a motion for class certification, however, the court does not pass upon the merits of plaintiff's claims. See Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177-78 (1974).

The court will first examine whether plaintiff has shown that the classes meet the requirements of Rule 23(a).[2]

[2] Because the definitions of the first and second classes are identical except for the limitations period and because the UTP/CPL and FDCPA sections at issue are so similar, the following discussion is applicable to both proposed classes.

Numerosity

Rule 23(a)(1) permits class action treatment only when "the class is so numerous that joinder of all class members is impracticable." There is not a minimum number which automatically satisfies the numerosity requirement and plaintiff does not have to allege the exact identity or number of the proposed class members. See Williams v. Empire Funding Corp., 183 F.R.D. 428, 437-38 (E.D. Pa. 1998); Dirks v. Clayton Brokerage Co. of St. Louis, 105 F.R.D. 125, 131 (D. Minn. 1985). Classes of more than a hundred persons are generally sufficient to satisfy the numerosity requirement. See Weiss v. York Hospital, 745 F.2d 786, 809 n.35 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985); Williams, 183 F.R.D. at 437-38. Defendant acknowledges that it sent approximately 83,000 letters containing the challenged language to at least 500 Pennsylvania residents in the pertinent period. Plaintiff has satisfied the numerosity requirement.

Commonality

The court must next determine whether common questions of law and fact exist in the putative class. "The threshold for commonality under Rule 23(a)(2) is significantly less rigorous than the Rule 23(b)(3) requirement that common questions of law or fact predominate over questions affecting only individual class members." Strain v. Nutri/System, Inc., 1990 WL 209325, at *3 (E.D. Pa. Dec. 12, 1990). Indeed, the named plaintiff need only share one question of law or fact with the prospective class. See Williams, 183 F.R.D. at 438. The alleged existence

of a common unlawful practice generally satisfies the commonality requirement. See Anderson v. Dep't. of Public Welfare, 1 F. Supp.2d 456, 461 (E.D. Pa. 1998). Plaintiff relies on essentially the same legal predicate and the same facts about the letter and defendant's collection practices as would the proposed classes. This is sufficient to show commonality.

Typicality

Under Rule 23(a)(3), the claims of the representative parties must be typical of those of the class they seek to represent. The typicality requirement is satisfied if the plaintiff's claim arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory. Barnes v. American Tobacco Co., 161 F.3d 127, 141 (3d Cir. 1998); Baby Neal v. Casey, 43 F.3d 48, 57 (3d Cir. 1994).

The threshold for establishing typicality is low. Zlotnick v. Tie Communications, Inc., 123 F.R.D. 189, 193 (E.D. Pa. 1988). The Third Circuit has observed that "typical" does not mean "identical". Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1984). The court must focus on whether the plaintiffs' individual circumstances are markedly different or whether the legal theory upon which the claims are based differs from that upon which the claims of the other class members will be based. Id. at 786.

Generally, the typicality requirement is satisfied where all claims arise from the same alleged fraudulent scheme. See In re Prudential Ins. Co. v. America Sales Litig., 148 F.3d

283, 312 (3d Cir. 1998); Baby Neal v. Casey, 43 F.3d 48, 57 (3d Cir. 1994) ("cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims").

Defendant argues that plaintiff's claims are not typical because the wages of some class members may be subject to legal garnishment, and such persons would have to proceed on a legal theory different from one predicated on the use of a letter threatening an action which was illegal. Defendant, however, does not actually identify any person within the proposed classes whose wages legally could have been garnished. The court will not deny class certification based on defendant's speculation, particularly when the court can modify the class if necessary after the conclusion of discovery.[3]

Defendant also argues that plaintiff does not state a claim typical of the class because he has not produced evidence that he was not legally subject to wage garnishment. Plaintiff's averment in his complaint that he was not subject to any exception under Pennsylvania law is sufficient to sustain class certification in the absence of any evidence from defendant to the contrary. See Kahan v. Rosenstiel, 424 F.2d 161, 168-69 (3d Cir. 1970).

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[3]Moreover, a defendant must produce some evidence to defeat a plaintiff's prima facie showing that a proposed class meets the requirements of Rule 23. See, e.g., HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 7.17 (3d ed. 1992) (after plaintiff makes prima facie case for class certification, burden shifts to defendant to produce evidence to the contrary).

Adequacy

The adequacy requirement of Rule 23(a)(4) involves a two-step inquiry. The court must first be satisfied that plaintiffs' counsel are qualified to conduct the instant litigation. See Torres v. Careercom Corp., 1992 WL 245923, (E.D. Pa. Sept. 18, 1992). Defendants have not challenged the ability of plaintiffs' counsel in this regard and plaintiff has presented evidence to demonstrate his counsel is able to provide competent representation in this action, including an affidavit of counsel reciting his successful participation in similar consumer class actions.

The court must then determine that there is no conflict of interest between the claims of the class representative and the other members of the proposed class. This requirement overlaps with typicality. See General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982). As discussed above, plaintiff's claim is typical. Like the other class members, plaintiff’s claim is predicated on defendant's use of a form letter which was allegedly false, misleading and deceptive in violation of federal and state consumer protection laws. Defendant has not produced anything to show any conflict of interest.

Predominance

To certify a class under Rule 23(b)(3), the court must find that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members” and that “a class action is superior to other available

methods for the fair and efficient adjudication of the controversy."

The existence of individual questions of fact does not per se preclude class certification. See Eisenberg, 766 F.2d at 787. Rather, predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997).

Class certification is generally appropriate where a defendant has engaged in a pattern of uniform activity. See id. at 624 (predominance test readily met in cases alleging consumer fraud); In re Prudential Ins. Co., 148 F.3d at 314-15 (predominance requirement is satisfied where class member claims arise from a common scheme by defendant). Here, the same common question of law predominates, that is, whether the challenged language violates the FDCPA by improperly threatening wage garnishment. Each class member would also have to prove many, if not all, of the same essential facts about defendant's collection efforts.

Superiority

This requirement "asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." In re Prudential Ins. Co., 148 F.3d at 316 (internal citations omitted). Rule 23(b)(3) identifies four considerations pertinent to this determination: (1) the interest of class members in bringing separate actions; (2) any litigation already commenced

by or against class members; (3) the desirability of litigating the claims in the forum; and, (4) the likely difficulties in managing the class action.

In cases of this type, the amount of actual damages will rarely be substantial. See Lake v. First Nationwide Bank, 156 F.R.D. 615, 626 (E.D. Pa. 1994).[4] Thus, they would have little incentive to prosecute actions individually. See id. at 616. See also Sledge v. Sands, 182 F.R.D. 255, 259 (N.D. Ill. 1998) (many members of potential FDCPA class are unaware their rights have been violated).

Plaintiff resides in Pennsylvania and all perspective class members are Pennsylvania residents. Defendant has a regional office in metropolitan Philadelphia and does not claim that litigation in this district would be burdensome.

Neither party has presented evidence of any other action commenced by or against prospective class members in this action.

Defendant has not suggested any likely difficulty in managing the class action.

The court finds that a class action would be a superior method of litigating this controversy.

Plaintiff has satisfied the numerosity, commonality,

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[4]Under the FDCPA, each class member may recover actual damages, attorneys fees and statutory damages of up to $1000. See 15 U.S.C. § 1692k(a)(2)(A). Recovery under the UTP/CPL is limited to attorneys fees and threefold of actual damages. See 73 P.S. § 201-9.2.

typicality and adequacy requirements of Rule 23(a), as well as the criteria of Rule 23(b)(3) that common issues of fact or law predominate and that a class action is a superior method of litigating the controversy.

Consistent with due process and Rule 23(c)(2), the best notice practicable under the circumstances must be provided to class members of the existence and nature of the action, their right to opt out and the consequences of not doing so. The court cannot determine whether records exist from which personal notice could be effectuated. Plaintiff has submitted no proposed form of notice with his motion.

Accordingly, plaintiff's Motion for Class Certification will be granted on condition that plaintiff promptly amends the definition of the second class to conform with his presumed purpose as referenced in footnote 1 or satisfactorily explain why this should not be done and promptly submits his proposed form of notice with an explanation of why it would constitute the best notice practicable under the circumstances.

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O R D E R

AND NOW, this day of September, 2000, upon consideration of plaintiff's Motion for Class Certification (Doc. #14) and defendant's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** subject to the two conditions set forth in the last paragraph of that memorandum.

BY THE COURT:

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JAY C. WALDMAN, J.